No. 16334

United States Court of Appeals
For the Ninth Circuit

CANADIAN PACIFIC RAILWAY CO., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S REPLY BRIEF

BOGLE, BOGLE & GATES
THOMAS L. MORROW
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

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QUESTIONS PRESENTED

It would be inappropriate to consider any question raised by appellee's specification of errors as appellee took no appeal. An appeal may be instituted only by filing wih the District Court a notice of appeal. Rule 73, subdivisions (a) and (b), 28 U.S.C.A. The rule applies to cross-appeals in admiralty. *International Milling Co. v. Brown Steamship Co.* (2d Cir. 1959) 264 F.(2d) 803.

The primary question presented is one of liability of the owners of the S.S. PRINCESS LOUISE for damage to appellee's Seattle-Fort Lawton submarine cable.

It is appellant's position that the question of liability is to be determined by the evidence as to where

the submarine cable broke and where it was damaged. Was the submarine cable broken or damaged at a point or place within a marked or an unmarked cable area? Other subordinate questions are as follows:

1. Did the government prove that the submarine cable broke during the maneuvers of the PRINCESS LOUISE between 2:45 p.m. and the time she docked at 3:48 p.m.?

2. Did the trial court err in excluding a 1958 U.S.C. & G.S. Chart No. 6446, being respondent's Exhibit A-11 offered for the purpose of showing the feasibility and the practicability of the government marking thereon the location of the previously unmarked part of Seattle-Fort Lawton submarine cable?

3. Did the trial court err in admitting and considering hearsay evidence on the question of damages?

We are mindful of the rule that clear error must be shown by the appellant to gain a reversal and with this rule in mind, make reply to the brief of the appellee, which will, we feel, assist this court in gaining a clear perception of the grievous errors of the trial court in its findings.

REPLY TO APPELLEE'S COUNTER-STATEMENT OF CASE

The appellee states, page 4, Brief, that the south side of Pier 64 where the PRINCESS LOUISE docks "is *800 feet north* of the red line stub extending out from the shore to deep water and indicating the shoreward cable area within which appellee's submarine cable lay,"

relying on the United States Coast & Geodetic Survey Chart, respondent's Exhibit A-1.

We measure the *closest distance* to be *900 feet.* The distance between the two positions *along the pier line* is 1,200 feet. The distance along the pier line from the south side of Pier 64 to in between Pier 56 and 57 where the Fort Lawton cable comes out of the sea wall is 1,800 feet. IMPORTANT: *The position of the break in the cable designated by a small blue circle on respondent's Exhibit A-1 as "Seattle broken end" in an unmarked cable area is approximately 2000 feet west and north of the point* on the red stub line where appellee measured 800 feet to Pier 64. The position where the break occurred and where any damage appeared on the submarine cable is unmarked on the chart. Respondent's Exhibit A-1.

The appellee, pages 3 and 4 of Brief, states, referring to observations of Captain Langworthy, a disinterested witness, "During these maneuvers she was seen to have her starboard anchor on the bottom and dragging * * * " *But this was after the* PRINCESS LOUISE was *close to her own CPR dock, Pier 64!*

A critical examination of these "observations" indicates that the CPR boat's southernmost portion of her approach was Pier 59 (R. 102) where she made a turn to the left (R. 102) and "headed toward Pier 64, after it made its initial turn" (R. 103) and the witness stated "she had her hook down, her anchor (R. 103). He did not see her anchor drop (R. 107) and the PRINCESS LOUIS *was backing when he observed her anchor chain* "off the face of the pier," Pier 64 (R. 122, 123).

Clearly the PRINCESS LOUISE was not within any *marked* cable area at the time of the witness' observations, but she could have been over the Fort Lawton cable in an *unmarked cable area* (Respondent's Exhibit A-1).

True, as appellee says at page 4 of the Brief, the same witness observed that the PRINCESS LOUISE had scope on her chain which would indicate the anchor was on the bottom (R. 103, 107-108), but during this observation *the* PRINCESS LOUISE *was backing,* "she was backing" off and away from Pier 64 and being blown northerly (R. 122-123) and making sternway, possibly over the *unmarked* Fort Lawton cable (Respondent's Exhibit A-1). The witness testified that the PRINCESS LOUISE was "approximately" 50 feet off Pier 64 when asked to state his best estimate of the PRINCESS LOUISE off Pier 64, "when you saw her anchor chain as though she was dragging her anchor" (R. 125).

The appellee concludes (Brief, p. 4) "thus, SS PRINCESS LOUISE, at some time during the hour preceding 3:48 p.m., her docking time, was seen over the cable area off Pier 57 *and northward"* (R. 102, 105, 42, 43, 51, 57). The references R. 102 and 105 refer to Captain Langworthy's testimony as above noted, that is, when the PRINCESS LOUISE was backing off of Pier 64 when he saw her anchor chain as though she was dragging her anchor (R. 125). The PRINCESS LOUISE was indeed northward of Pier 57. This witness said that the PRINCESS LOUISE did not go further south than Pier 59 and her anchor chain did not show scope until she was within 50 feet of Pier 64 (R. 102, 103, 124, 125).

Then she backed possibly into the *unmarked* Fort Lawton cable area as illustrated by the witness between "P-1" and "P-2" marked on the chart (Respondent's Exhibit A-1, R. 125, 126).

The references R. 42, 43, 51, 57 have to do with the testimony of Col. George F. Rogers, making allowances for his self-serving conclusions, he saw exactly what Captain Langworthy saw. He testified he "could see out of the window of the fifth floor of the Federal Office Building that this PRINCESS ship was having trouble docking" (R. 38) *"at the CPR Dock"* (R. 39). When he *"first noticed"* the CPR ship she was "Just off the CPR Dock. She was part—she overhung the dock somewhat" (R. 40) — that *when he first observed her starting to back,* she was *"down next to her own dock, the CPR Dock"* (R. 50). "I saw her first relatively parallel *to her dock"* (R. 51). He observed the PRINCESS LOUISE "come back from her own Pier about two ship lengths" (R. 49), "two or three, I said" — that would be 600 or 900 feet. According to Col. Rogers, she backed "generally towards West Seattle (R. 51) — that would be *southwest"* (R. 51). Pier 57 is *southeast* of Pier 64. The direction toward West Seattle or southwest from Pier 64 takes her not toward Pier 57, but away from Pier 57, and toward the unmarked cable area where the Fort Lawton cable lies (Respondent's Exhibits A-1 and A-9). When asked what the PRINCESS LOUISE was doing at the time he saw her anchor dragging, he replied she was backing (R. 51).

He testified "The PRINCESS LOUISE when I first saw her was up at the CPR dock * * * and she come and

moved back *over our cable area,"* and he said, *"I would put the ship 600 YARDS off my office after it got into the cable area"* (R. 43). He likewise estimated it was 400-500-600 YARDS between his office and the CPR dock (R. 47, 48). In other words, the ship was the same or a greater distance away from his office than the CPR dock and NOT in a *marked* cable area (Respondent's Exhibit A-1). Actually the CPR dock is 1,000 YARDS from Rogers' office (Respondent's Exhibit A-9). The ship being the same 1,000 YARDS or even a greater distance away than the CPR dock, according to estimates of Rogers, was in an UNMARKED area. *This area is UNMARKED for any cable* (Respondent's Exhibit A-1). NEVER did the witness identify the PRINCESS LOUISE as being within the *marked cable area.* The witness no doubt was referring to an *unmarked* cable area in which the Fort Lawton cable rested. He confirmed that the Fort Lawton cable did not proceed due west in the Fort Lawton cable area as marked on the chart. He testified "that the cable runs down alongside the pier (Pier 57) and swings out toward Fort Lawton (north)" (R. 55). When asked if he was referring to "the actual cable area marked on the chart," he said "No. I was referring to the area out off of the pier (north) that our cable run in" (R. 55). The actual coordinates on the chart, he did not know what they were (R. 55).

The appellee (Br. 5) states "The depth in the cable area vicinity where she was seen and where she turned in, swinging left and closing inshore in her approach, was less than the reach of her anchor."

As noted above, the PRINCESS LOUISE was NEVER observed in a MARKED cable area and there is *no* evidence her anchor was out before she got close to her own pier. She may have backed into an *unknown* and *unmarked* cable area. The Fort Lawton cable swings north outside the boundaries of the marked cable area into an unmarked area (Respondent's Exhibit A-1) and follows along a 160-180-foot depth curve (Respondent's Exhibits A-1 and A-10), *which previously unmarked cable area was subsequently marked* (Respondent's Exhibit A-11).

Appellee states page 5 of his Brief, "Communications had been routine until it was lost after 3:00 p.m. on March 21, 1955, when the last contact was had with Adak (R. 79-81) and was found inoperative at 4:00 p.m. when Kodiak could not get through to Seattle" (R. 82-84).

Appellee's statement is not a correct statement of the evidence. The communications were not lost between 3:00 and 4:00 p.m. on March 21, 1955. The radio at 3:00 p.m. and 4:00 p.m. was simply released by the Kodiak station to the Adak station (R. 90, 92). In fact, the government witness admitted that there was no indication to him that the service was blocked between 3:00 and 4:00. He testified "It *would not* indicate to me that the service was lost between 3:00 and 4:00 o'clock" (R. 91). The only disruption of service established was after the PRINCESS LOUISE tied up to the dock at 3:48 p.m. The government witness testified "I can only indicate that the line was out from 4:05 p.m. to 4:20 p.m. That is the only time that I can indicate it

was out, from my station" (R. 93). Even at that, he "didn't know" and "wouldn't know" that the trouble was on the submarine cable (R. 93).

The appellee states that the per diem cost of operation of the LENOIR was established at $1,500 per day, relying on the record at page 164. The trial court did not accept this evidence as it was mere conclusion of an accountant based on a study in October, 1954 (R. 164), and represented rather not the daily cost but what the ship would be chartered for on a daily basis to a commercial concern (R. 191) to go to Alaska (R. 196), and the evidence was stricken by the trial court (R. 192) against which action no appeal was taken by appellee.

The evidence of direct costs, $6,954.23, of course, was hearsay to which objection was timely taken and from which appellant appeals, appellant's opening brief (R. 19).

REPLY TO APPELLEE'S ARGUMENT

The appellee states, page 8 of Brief:

> "The position of the SS PRINCESS LOUISE in the cross-appellant's cable area was clearly fixed by the evidence. * * * "
>
> " * * * He (harbor patrolman Langworthy) stated on direct examination (R. 102) that she turned left towards the piers in the vicinity of piers 59 and 57, approximately a *tenth of a mile* off the pierhead line and farther south than he was accustomed to see her maneuver. (R. 102, 103)."

Actually, the witness testified " * * * she came in on her regular course with the exception of the last por-

tion, and she went farther south than usual * * * " (R. 101). During the *southernmost position* of her approach: "the CPR boat could have been as far as Pier 59" (R. 102). "Yes, it made *a slight turn* as it approached" (R. 102). *Her turn* "would be to the left as it approached toward the piers, *this is off the pierhead line, approximately a tenth of a mile,* and like I say, it was farther south" (that is as far south as Pier 59) (R. 102). "At that time (time of slight turn) I believe *it would have been headed toward Pier 64,* after it had made its initial turn. *This turn is not a very pronounced turn, but it is a turn of normal course that it always takes.* In this case the ship itself was farther to the south this day than usual, *but it still made its turn"* (R. 102). Again he testified the PRINCESS LOUISE made her *slight* turn at Pier 59.

> "Q. Off what pier was it when it made its turn farther to the south?
>
> A. I would say Pier 59, or within that vicinity." (R. 103).

The reference to being a tenth of a mile, 600 yards, off the pierhead line is consistent with Captain Campbell's testimony that he was 3 to 4 cables (600-800 yards) off the wharf (Pier 64) when the vessel was on a Southeast course (R. 358) which placed him 4½ cables (900 yards) away from Pier 57 when he made the turn in relation to Pier 64 and 63 (R. 349). (Respondent's Ex. A-1).

The appellee says, page 9 of brief—

> "The witness described observing that the PRINCESS LOUISE's starboard anchor was down *at*

this time and that the anchor was dragging is demonstrated by the angle at which the chain extended from the hawse on the bow of the ship." (R. 103, 104, 107).

The witness observed the anchor was down but not at the time the PRINCESS LOUISE *made her turn.* The witness was asked what he observed during *any maneuvers* and testified "she had her hook down" (R. 103) and noticed "there was scope on the anchor chain" (R. 104), but he "did not see her anchor drop" (R. 107).

On cross examination the witness clearly indicated that when he saw the anchor was down and dragging it was when the vessel was backing away from Pier 64 after making her turn at Pier 59. The witness observed the anchor chain with scope on it "from the bow to the anchor chain" (R. 122) while "she was backing" (R. 122) and when "she was right off the face of the pier (Pier 64)" being blown to the north (R. 122, 123). Capt. Campbell testified: The starboard anchor of the PRINCESS LOUISE was first lowered 15 fathoms and then dropped to 30 fathoms *when she was coming in on a line between the CPR Dock and Pier 63,* about 900 feet from the southwest corner of Pier 63 (R. 325). The "last 15 was close in to our wharf (Pier 64)" (R. 344).

The appellee says (Br. p. 10), "The red line in positions 'P-1' and 'P-2' on Respondent's A-1 were the witness's estimate of her position *after* the southerly approach, dragging anchor, and reflect her backing (R. 124, 125) out of the mess she got into by her negligent attempt to approach downwind without aid of a tug."

The PRINCESS LOUISE was being navigated cautiously by an experienced master and the unjustified remarks have no relevancy or connection with the preceding statement of evidence. Capt. Langworthy was asked: "What is your best estimate of the position of the PRINCESS LOUISE off 64 when you saw her anchor chain as though she was dragging anchor?" He replied: "Approximately 50 feet." He was then requested to mark the position "P-1" on Respondent's Exhibit A-1 (R. 125). He then indicated her sternway and leeward course as she was blown north broadside to the wind and marked the end of that course "P-2" on the chart (R. 126). *There is no evidence of the* PRINCESS LOUISE *dragging her anchor during her southerly approach as appellee might seem to infer.* Mind you this is a disinterested government witness who restricts the dragging of the anchor to the vicinity of Pier 64 in an UNMARKED area after the first approach of the PRINCESS LOUISE. The positions "P-1" and "P-2" on respondent's Exhibit A-1 demonstrate the probability that the PRINCESS LOUISE hooked the Fort Lawton cable in its unmarked position.

Appellee states, page 10 of its brief: "The witness corrected a brief impression created by appellant's cross-examination, that the anchor had been observed for the first time when dragging only some 50 feet off Pier 64; *he stated he observed this earlier when she was heading southerly and began to change her course* and swing around to head for Pier 64 (R. 127)."

On this point the witness said that the earliest time he recalled seeing the anchor chain was *"shortly after*

she changed course and headed towards Pier 64" (R. 127). He did not say he observed the anchor chain *when she was heading southerly* and began to change her course.

The appellee relies upon Col. George F. Rogers for his observations—"Seeing the PRINCESS LOUISE in the vicinity of Pier 57 and the 'cable area'—two ship-lengths off Pier 57"—or 600 feet, alleges that "cross-examination confused the witness." Appellee's brief, page 11. Only Col. Rogers' conclusions were confusing and misleading. His observations create quite a different story. *He observed the anchor chain dragging only when the* PRINCESS LOUISE *backed out from Pier 64, backing to the Southwest two or three ship lengths.*

Col. George F. Rogers is understandably an interested witness for the government, whose testimony bears close scrutiny in order to get at the unvarnished truth of his observations.

Out of his office window on First and Madison he saw the PRINCESS ship was having trouble docking (R. 38) at the C.P.R. dock (R. 39, 40). She backed down * * * and had an anchor dragging at that time (R. 39). "That's the end of what I observed" (R. 39). Now we have left out of the witness's testimony "She backed out down towards our cable area," (R. 39) because that is a mere conclusion. On leading questions he testified the PRINCESS LOUISE moved toward the vicinity of Pier 57 (R. 41) to about two ship lengths off, which we discount entirely because *Pier 57 is Southeast* of the Princess wharf, Pier 64, and the witness subsequently testified *she backed Southwest* from Pier 64

which would take her away from Pier 57, particularly while she was making leeway with a Southeast wind blowing on her broad side. He saw her first relatively parallel to her dock then she backed from her own pier two or three ship lengths (R. 49, R. 51) and backed in the direction of West Seattle or Southwest (R. 51).

We discount the distance the witness estimated off Pier 57, first because his observations indicate she did not move in that direction, secondly, because backing two or three ship lengths out from Pier 64 would take her even further away from Pier 57, and thirdly, because the witness observed that when the PRINCESS LOUISE was in what he described as "our cable area" after backing down from Pier 64, she was at least the same or a greater estimated distance away from his office than the C.P.R. Dock. For example: He variously estimated the distance from his office to the C.P.R. Dock, Pier 64, at 400 yards, 500 yards and 600 yards (R. 47, R. 58). He estimated the PRINCESS LOUISE 600 YARDS off his office after she got into the cable area (R. 41, 43). *Actually the distance from his office to the end of the C.P.R. terminal, Pier 64, is 1000 YARDS* (Respondent's Exhibit A-9). If the 500 yards estimate to the C.P.R. Dock becomes 1000 yards, then the 600 yards estimate to the PRINCESS LOUISE becomes 1200 yards. Well, that places the ship closer to the place where the cable was broken in an UNMARKED AREA.

This makes Rogers' testimony jibe with that of Capt. Langworthy who likewise saw the PRINCESS LOUISE drag anchor backing out from Pier 64 and be-

ing blown north put her in an UNMARKED AREA. (Respondent's Exhibit A-1) (R. 125, 126).

> The appellee states (page 12 of Brief)—"That the cable was properly laid within the marked area shown on charts in general distribution and use by mariners was also clearly shown by the testimony of Captain John Bowen, Master of the cable repair ship LENOIR. (R. 232, 285, 287, 306, 318)."

This statement is only partially correct for it does not take into account the fact the cable was damaged in an unknown and unmarked cable area.

Respondent's Exhibit A-1 shows the bearing of the cable *as authorized,* being marked "282° 49′—proposed ACS cable," originating in a marked cable area and extending westerly into deep water of 197 feet, 239 feet, etc., originating as it were between Piers 56 and 57. Note there is a margin of safety between the bearing or cable as authorized and the red stub indicating a cable area extending south from alongside the southerly side of Pier 58. See also War Department Permit, Libelant's Exhibit 5.

Respondent's Exhibit A-1 *also shows* the ACS cable by red marks plotted by Captain Bowen as relocated in 1953. *It has not one but four bearings deviating from the authorized bearing 282° 49′ and veering northerly in an UNMARKED AREA,* cutting as it were, the red stub marking the northerly boundary of the marked area on the chart. What is more, the relocated cable outside the market area extends *not into deeper water* as it would if located along the authorized bearing. *Instead the cable as relayed in 1953 is at 160-180 feet*

deep in an unmarked area (Respondent's Exhibits A-1, A-5 and A-10, and Libelant's Exhibit 5). See also pilot house log 1953 of the cable ship LENOIR, Exhibit A-6. The master of the cable ship LENOIR plotted the 1953 coordinates showing the relocation in an unmarked cable area on Respondent's Exhibit A-1 (R. 286-287).

As stated by appellee, the red stub on the chart (Respondent's Exhibit A-1) marking the northerly boundary of the *marked* cable area extends nearly 600 yards from shore, 580 yards to be exact, according to the Government's witness (R. 142)—that is, 1,640 feet; appellee cites the direct evidence of Stanley H. Christensen, cable foreman, to show that 1,500 feet were picked up and noted "in fairly good condition, but from then on I observed that something had been dragging along the cable and had scuffed the outer jute * * * " (R. 220).

As 3,450 feet (R. 222, 298) were picked up, this would leave 1,950 feet of cable damaged by ship's anchor before it broke which in itself sounds quite incredible. On cross-examination the extent of this damage was reduced by the witness working from the other end of the cable. When questioned by the court, the witness said the length of the cable he observed to be damaged was 1,500 feet (R. 226).

> "COURT: The length of the cable damage was about a thousand feet, is that right?
>
> A. No, sir, I'd say 1,500 feet * * * ." (R. 226)

Thus, the 1,500 feet deducted from 3,450 feet of cable to the break leaves 1,950 feet of unmarked and un-

damaged cable. As the marked cable extended 580 yards out from the sea wall, or 1,740 feet, the witness' answer to the court's question admitting only 1,500 feet of cable was damaged, places the marks the witness saw on the cable beyond the marked cable area. The witness, however, added another 200 feet thereafter and made the damaged part of the cable 1,700 feet (R. 228), but still the markings on the cable would be at least 50 feet beyond the marked cable area *where the cable was supposed to be,* in deep water beyond the reach of an anchor swinging at 180 feet. The witness ended up with three different results so far as damaged cable was concerned, 1,950 feet, 1,500 feet, and 1,700 feet, and at the end of the court's interrogation the court remarked "I have less information than I had before the witness took the stand" (R. 227). There is no showing that the cable was not so marked as testified by the witness, prior to the 1955 casualty, and at the time it was replaced there in 1953. The appellee failed to produce any damaged cable for measurement or inspection. On the other hand, *the cable account of operation No. 144-L appearing on page 9 of the 1955 deck cable report of the cable ship* LENOIR, *shows 2,930 feet of cable salvaged on the operation and 2,930 feet of cable returned to the dock.* Respondent's Exhibit A-4. *This means that only 520 feet of cable was marked or damaged by a ship's anchor.*

While the salvaged cable of 2,930 feet contradicts the foreman's testimony (not accepted in any event by the trial court), it supports the testimony of the foreman's boss, the master of the cable ship LENOIR, *who testified to 500 feet of damaged cable* (R. 241, 255)

and who concluded that a ship's anchor had hooked the cable and dragged it along a distance and then broken the cable (R. 242). From the experience of Capt. Bowen of the cable ship LENOIR in the repair and laying of cables, *the position in which the broken end was logged aboard is the closest measurement to that (the) position the cable was hooked* or contacted by any dragging object (R. 306, 307). This position is marked on Respondent's Exhibit A-1 by Capt. Bowen, by a small blue circle designated by a blue spear and label "Seattle broken end." Note this is in an unmarked area. According to Capt. Bowen the break was 450 yards (we make one-quarter of a MILE by measurement) from the closest marked cable area on the chart (R. 293).

The foreman, Christensen, did not attribute greater damage along the length of the cable specifically to the 1955 casualty. A similar repair was performed in 1953 (R. 31) but closer to shore where the cable was parted at the manhole at the sea wall. See page 1 of 1953 cable report of the cable ship LENOIR under entry of 1400 for 5 February, 1953, covering the inspection by Capt. Bowen and Mr. Christensen (Respondent's Exhibit A-5). This 1953 cable report shows at 1520 on 6 February, 1953, "P.U. (pick up) cable cut, 10 feet outside of sea wall." This cable was relaid by Capt. Bowen in 1953 (R. 231).

As Capt. Bowen attributed 500-600 feet of scuffing and damage as caused by the anchor of the PRINCESS LOUISE or some other vessel in 1955 (R. 309) and 2,930 feet of good cable was returned to stock out of a possible

3,450 feet, the evidence given by Mr. Christensen of marks on the cable for an additional thousand feet are of little significance particularly in view of evidence that the cable was damaged in 1953 at a point closer in to shore, and damage was of similar nature. There is the added possibilities the grapnel of the LENOIR scuffed the cable during the 1953 operation. A grapnel such as used by the LENOIR is a hook designed for fishing for cables on the bottom (R. 311). If such a grapnel were dragged lengthwise to a cable it would "progressively mark the cable more and more" as it progressed into deeper water (R. 312). The ADMISSIONS of Capt. Bowen and record of the 1953 cable repair and the unsatisfactory testimony of Christenson demonstrate the error in appellee's conclusions stated on page 14 of its brief that the damage observed as commencing 1,500 feet out from the sea wall conclusively establishes that the cable was hooked by the PRINCESS LOUISE's anchor well within the cable area.

Capt. Bowen has demonstrated conclusively that the Fort Lawton cable was hooked by a ship's anchor in an unknown and unmarked area in the vicinity of the position of the break marked "Seattle broken end" on the chart. Respondent's Exhibit A-1 (R. 269).

The flagrant and glaring error of the trial court was never more pronounced than in this case where it failed to consider the conclusive evidence brought out by appellant's cross-examination of the master of the cable ship, which established conclusively (1) that the break in the cable and any contact with an anchor occurred well outside any marked cable area and in an unmarked

area; and (2) that the cable was damaged because it had been relocated in 1953 in an unmarked cable area.

The appellee at pages 15 and 16 of its brief says that the negligence consisted of approaching the C.P.R. terminal up wind rather than coming alongside. The docking maneuvers and docking of the PRINCESS LOUISE, however, were accomplished without injury to passengers, crew or ship, and without damage to the dock, and by an experienced ship's master who had followed the usual practice in the face of a southwest gale (R. 322). The only negligence *that could have proximately caused* damage to the cable would have been the dropping or dragging of an anchor in a marked or known cable area. The cable area of the Fort Lawton cable after turning north outside the marked cable area, was unmarked and unknown to the mariners such as the master of the PRINCESS LOUISE. Absent any evidence the PRINCESS LOUISE dropped or dragged her anchor within the marked cable area, and absent evidence there was any damage to the Fort Lawton cable within the marked area, the charge of neglect of the master to make more observations, take soundings or maneuver without the use of a tug, not heaving the anchor before attempting to make the second approach, etc., become wholly immaterial.

> The appellee states at page 17 of its brief—"That the PRINCESS LOUISE entered the cable area with her anchor dangling at the end of at least 180 feet of chain, on at least one occasion, is admitted by Capt. Campell, beginning at R. 358 * * *."

First, there is no evidence of an admission.

Appellee refers to the second approach. There is no evidence that the cable was displaced to the east or north which the drag of the cable by the anchor in that direction would have shown, hence appellee's point is of no significance. Besides, there is a satisfactory explanation of the evidence.

At the time of approaching the wharf (Pier 64) the second time before turning in, coming down to a position off Pier 64 the PRINCESS LOUISE was "heading down towards the end of the harbor with the Smith Building *on the port bow,* Smith Tower (R. 357). Very little way on ship at time — going straight ahead — headed in general direction, down harbor towards the Smith Tower about three or four cables off the wharf (Pier 64). Turned left toward Pier 64 — headed southeast when turning left and that would bring her in (R. 358) a general northeast (magnetic) direction."

There is nothing inconsistent with the foregoing testimony and the Captain's testimony of being 4½ cables, 900 yards, off Pier 57 (R. 349).

Three cables or 600 yards off Pier 64 on a course southeast true with the Smith Tower on the port bow places the vessel approximately 900 YARDS off Pier 57. Four cables or 800 yards off Pier 64 on a course southeast true with the Smith Tower on the port bow places the vessel approximately 1,100 yards off Pier 57. The same southeast course, magnetic instead of true, and the distances the vessel was away from Pier 57 at the time are likewise about four and one-half cables or 900 YARDS. Incidentally, the depth of water 3 to 4

cables off Pier 64 on a course headed southeast is just west of the 239-foot depth sounding on the chart. Remember, the wind was moving the vessel north after the turn northeast in toward Pier 64 away from the marked cable area (Respondent's Exhibit A-1).

The appellee states (Br. p. 18):

> "The record conclusively shows that the PRINCESS LOUISE was in the marked cable area *at the time* when the subject cable was broken."

The record is devoid of any evidence the cable broke between 2:45 p.m. and 3:48 p.m. on March 21, 1955, when the PRINCESS LOUISE engaged in docking at the CPR Dock, Pier 64. The only evidence on this point was given by the Kodiak Station operator who admitted on questioning by the court that the only absolute blockage of the cable that he could prove by the record was from 4:05 p.m. to 4:20 p.m. (R. 93), that is, after the PRINCESS LOUISE docked.

Appellee contends it was discretionary with the court to exclude respondent's Exhibit A-11. This was illustrative of Capt. Bowen's admission that since 1955 the Fort Lawton cable area has been "marked to include the cable in its entirety from Fort Lawton to Seattle" (R. 315). Respondent's Exhibit A-11 shows the feasibility of marking the Fort Lawton cable and thus carry notice of the location of the cable to mariners such as the master of the PRINCESS LOUISE within the rule of the *Carstens Packing Co. v. Swinney,* 186 Fed. 50 (C.A. 9, 1911).

REPLY TO APPELLEE'S CLAIM FOR ADDITIONAL DAMAGES

The appellee took no cross appeal from either the court's rejection of evidence or the court's finding on the amount of damages, and hence this court has no obligation to consider appellee's specifications of error in respect thereto. *International Milling Co. v. Brown Steamship Co.,* 2 Cir. 1959, 264 F.(2d) 803. The authorities cited by appellee (Br. p. 20), were prior to the present Federal Rules of Civil Procedure and are not in point.

Appellee states, page 24 of brief:

> " * * * the trial court also properly admitted and considered the cost accountant's expert oral testimony relating to the direct costs of the cable repair job and the daily operational costs of cable repair ship."

Appellee further states, page 25 of brief:

> " * * * The oral testimony of the witness as to the various items considered by him in arriving at his conclusions respecting the operating costs of the vessel, were offered, and accepted, not as tending to prove the truth or accuracy of those items, but simply as demonstrating the grounds for the witness's opinion."

The appellee's cost accounting expert was a cost accountant by the name of Sergeant O'Brien (R. 149) who produced a ledger sheeet (R. 152) marked Exhibit 3, prepared by him June 4, 1955 (R. 155), over two months after the casualty. It was prepared from an investigation made by accumulating costs of labor from individual time sheets (R. 161), from labor records, the

ship's records, and subsistence records (R. 162). The ledger sheet (Libelant's Exhibit 3) purported to be an official record of the Alaska Communications System (R. 163) and was first admitted in evidence (R. 163). Then the court changed its ruling and excluded Exhibit 3 (R. 184) with the statement — " * * * If the witness has stated orally any information, the Court will consider that in connection with this case, * * * " (R. 185). On cross-examination it appeared that Sergeant O'Brien included in his figure $504 for depreciation, and $188.20, or 15% for overhead (R. 188). The witness concluded from information furnished that the out of pocket expenses amounted to $6,262.13 (R. 189). Specifically he said he prepared a cost analysis of the Seattle-Fort Lawton cable repair job in 1955 in the course of preparation of which *he found certain facts* which were included therein from which he concluded the costs were $6,954.23. The figure arrived at was from labor records, the ship's records, and subsistence records which he audited on the job (R. 161-162) to which evidence there was a timely objection that it was hearsay evidence and not the best evidence (R. 161-162). Appellant specified error on the ground that the evidence was hearsay (Appellant's Br. p. 19, 35). The witness said: "These are direct costs" (R. 162). In other words, the witness in respect to these damages was not expressing the opinion of an expert on the amount of the direct costs but only that they were direct costs and the results of his computation. Direct costs were not proven by competent testimony. What he found to be direct costs was pure hearsay. What he had

obtained from the records or others was not of his personal knowledge. There appeared to be no necessity to rely upon this hearsay evidence of direct costs as the master of the cable ship was present in court and could have testified what costs were incurred. How many men were employed in the repairs? What was the hourly rate? What was the cost of materials? How much cable was charged to the job, and how much used? Was there any allowance made in expenses for salvage? The witness O'Brien had no personal knowledge of these matters and the truth therefore could not be reached by cross-examination of the witness. The master of the cable ship in the court room having first knowledge, and other Government employees, undoubtedly could have testified as to what the direct costs were, but did not.

The rule is stated in Volume II, Wigmore on Evidence, Third Edition, §657, as follows:

> "§657. (a) *Knowledge must be founded on Personal Observation by the Senses, not on Hearsay.* The first corollary from the general principle of knowledge is what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others — in other words, must be founded on personal observation.
>
> "This general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental:
>
> " * * *
>
> "Upon this principle, the testimony of one claiming to have knowledge has constantly been

rejected when it appeared that he lacked personal observation."

In *United States v. Aluminum Co. of America* (D.C., S.D. N.Y. 1940) 35 F.Supp., 820, the opinion of experts as to quality or quantity of bauxite in various foreign countries based on publications and statements of third persons, was held inadmissible. There the court laid down the following rule, at page 823:

> "As I conceive, the law on the point may be briefly stated thus: Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court. With respect to the matter, in what impresses me as unambiguous authoritative judicial language, it has been said that 'the requisites of an exception of the hearsay rule' are 'necessity and circumstantial guaranty of trustworthiness.' *G. & C. Merriam Co. v. Syndicate Pub. Co.,* 2 Cir., 207 F. 515, 518. In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable."

On the point in question the court said, at pages 825, 826:

> " * * * As I see it, the effort of Alcoa is to introduce the opinion of an expert as to the quality or quantity of bauxite in various foreign countries where the sole evidence to show his knowledge of

> the facts is publications and statements of third persons. While the line of demarcation is hard to draw with accuracy, under the circumstances recited, at least in the way the matter stands in the present record, I think there is nothing shown which is sufficient to constitute the proffered testimony an exception to the hearsay rule nor to bring it within the ground of necessity, which is one of the requisite underlying foundations of the exception sustained in the Merriam case."

In the present case there is no reason shown why the government could not have produced a witness having personal knowledge of the payroll of the cableship and personal knowledge of the costs of the cable and other items of direct expense, and what is more, personal knowledge that those expenses were incurred on the job in question.

The rule is succinctly stated in Jones on Evidence, Third Edition, §376 as follows:

> "*Opinions Based Upon Hearsay—Conclusions of Law — Speculation.* Although, as we have seen, the opinions of experts may in some cases be based upon personal knowledge gained from their own observation or examination, they cannot give in evidence opinions based upon information gained from the statements of others outside the courtroom, since in such case the opinions would depend upon hearsay. * * * "

The case of *United States v.* The John R. Williams, (Cir. 2, 1944) 144 F.(2d) 451, is cited by appellant on page 28 of its Brief in support of its claim that damages should be increased and assessed on the basis of $1,500

average daily operational costs, as determined by the cost accountant in an analysis made in October, 1954, and May, 1955. *The case supports no such theory for assessment of damages.* In that case, of $1,918.67 damages assessed, $724.70 were not questioned. The remainder, as determined by court commissioner, consisted of current items of expense during a repair period of 8½ days, being $91.65 for fuel and water, $236.25 for crew rations and $866.07 for crew pay. Appellee here sought to prove similar items of costs and damages, and in addition, items of depreciation and overhead by its cost accountant, which proof failed because of its hearsay nature, and because the government failed to call available witnesses to properly prove direct costs. But what appellee is arguing for here is that damages should be assessed on the basis of a computation by an accountant as to the average cost of operating the cableship on a full-scale operation for laying cable, which cost analysis was made for the purpose of determining charter hire for commercial operation in Alaska on a daily cost basis (R. 192, 196).

CONCLUSION

It is respectfully submitted that the trial court committed clear error in respect to specifications of errors assigned by appellant in its opening Brief, and that the decree herein should be reversed and the case remanded

with instructions to enter a decree in favor of appellant, dismissing the libel.

Respectfully submitted,

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